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Marshall Dee Biesterfeld

OWNERSHIP OF STREETS AND RIGHTS OF ABUTTING LANDOWNERS IN COLORADO

By MARSHALL DEE BIESTERFELD*

Streets, highways and roads are designed to allow free, continuous, convenient passage across the land of others. The passage is a necessity. Strips of land are placed under control and supervision of public authorities who are given the duty of keeping the roadways unobstructed for the good of the public.

The abutting landowner is peculiarly situated in that he not only uses the streets in common with the general public but also uses the specific portion of the street abutting his land as an easement of access. A natural place to lodge limited control over the actions of the public authorities is in the abutting landowner; the courts have done just this. They have given the abutting landowner special rights.

Fine distinctions have been pronounced as to the nature of the title in the public and in the abutting landowner. Elimination of these has been suggested,[1] but a definite tendency of the court has been to uphold the importance of the distinctions. Colorado has, upon occasion, been unique in its decisions, and for this reason alone the subject is worthy of inspection.[2]

I. ESTABLISHMENT OF STREETS

Public streets can come into existence in several ways. The object is to place land in the possession and control of public authorities so that it can be maintained and kept free from obstruction. The two most common methods[3] by which streets come into the hands of the authorities are statutory dedications and common law dedications. Other methods are prescription, condemnation or purchase. The latter two methods are considered outside the scope of this article.[4]

A. Statutory Dedication

Early Colorado statutes required for a successful statutory dedication, an accurate plat signed, acknowledged and filed with the county clerk and city clerk. That plat had to be recorded by the county clerk with his certificate. Fulfilling these requirements would vest the streets in the city, in trust for public uses.[5]

Those have been repealed and streets become vested in the city through the procedures for incorporation which include presenting a petition with an accurate plat, holding an election, making return of election to the court and electing officers.[6]

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* Senior student, University of Denver College of Law.

1 10 McQuillin, Municipal Corporations § 30.37 (3d ed. 1950) quoting from Lewis, Eminent Domain.

2 All cases were read and are noted in text or footnotes that are digested in West's Colorado Digest under Municipal Corporations, Key Numbers 646 through 698. Certain other cases pertinent to this paper may be found under the topics Dedication and Highways.

3 11 McQuillin, Municipal Corporations § 33.01 (3d ed. 1950).

4 An act of Congress is also a method of creating a public highway: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Rev. Stat. § 2477 (1875), 43 U.S.C. § 932 (1958).

5 These statutes can be found in Colo. Stat. Ann. c. 163, §§ 152 to 159 (1935).

6 Colo. Rev. Stat. §§ 139-1-1 to 139-1-9 (1953), as amended, Colo. Rev. Stat. §§ 139-1-3,5 (Supp. 1960). See Colo. Rev. Stat. § 120-1-1 (1953) for dedications as county highways.

The Colorado Supreme Court has often said that a statutory dedication will be successful only if in strict compliance with the statutes.[7] A statutory dedication will fail, at least against a purchaser of the land without notice, where the plat and notes do not describe the road as running through the land purchased.[8] A dedication has failed because the acceptance did not get the required number of votes in the city council.[9] Lack of acknowledgment of the plat can invalidate the statutory dedication.[10] As will be discussed *infra*, the ownership of the street is altered by these failures.

A statutory dedication operates by way of grant. A common law dedication operates by way of *estoppel in pais*.[11] The dedication must be express when statutory and can be either express or implied when at common law. The statutory dedication will usually vest an estate in some type of fee simple,[12] whereas the common law dedication gives the public an easement.

Often the failure of a statutory dedication will result in a valid common law dedication because of the relative simplicity of the latter.[13] However, neither may result. An individual prevailed when he purchased without notice of the existence of a road because recording mistakes made the statutory dedication invalid. The evidence did not show any public travel along the line of the road, and the purchaser had done nothing from which to imply an intent to dedicate.[14]

B. Common Law Dedication

A frequent act that results in a common law dedication is selling lots with reference to a plat. The Colorado Supreme Court has several times[15] recognized the rule as stated in Angell on Highways:

> In this country there is quite a large class of cases in which dedication has been inferred from the sale of land, described by reference to a map or plat, in which the same is designated as laid off into lots, intersected by streets and alleys. It may be stated as a general rule, that where the owner of urban property, who has laid it off into lots, with streets, avenues and alleys intersecting the same, sells his lots with reference to a plat, in which the same is so laid off, he adopts such map by sales with reference thereto, his acts will amount to a dedication of the designated streets, avenues and alleys to the public.[16]

Correctly speaking, however, Colorado follows the general rule that the sale of lots with reference to a plat is only an offer to dedicate; the acceptance by the city is necessary to complete the dedication, and the grantee of the lots has no right against the city

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7 City of Leadville v. Coronado Mining Co., 37 Colo. 234, 86 Pac. 1034 (1906); John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895); City of Denver v. Clements, 3 Colo. 472 (1877).

8 Lieber v. People, 33 Colo. 493, 81 Pac. 270 (1905).

9 City of Leadville v. Coronado Mining Co., 37 Colo. 234, 86 Pac. 1034 (1906).

10 Town of Center v. Collier, 26 Colo. App. 354, 144 Pac. 1123 (1914).

11 City of Leadville v. Coronado Mining Co., 37 Colo. 234, 86 Pac. 1034 (1906); City of Denver v. Clements, 3 Colo. 472 (1877).

12 Brell v. Town of Ovid, 88 Colo. 198, 293 Pac. 961 (1930) concerns a dedication under present statutes.

13 See note 7 *supra*.

14 See note 8 *supra*.

15 John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895); Ward v. Farwell, 6 Colo. 66 (1881); City of Denver v. Clements, 3 Colo. 472 (1877).

16 Angell, Highways § 149 (3d ed. 1886).

until that acceptance.[17] This is not a universal rule. Some jurisdictions hold that the grantee has rights against the city in that this method of dedication is completed with the sale. The rule's justification rests in the reliance of the grantee upon the representation that streets are present.[18] In every case the grantee has a private easement he can enforce against the grantor.[19]

A common law dedication can arise by offering either expressly or impliedly to dedicate certain land to the public for street purposes. More controversy naturally arises over the issue of implied dedication. In *Starr v. People*,[20] the court set down rules to govern the finding of an implied dedication:

> In an action of this kind a dedication may be implied:
>
> 1. When it is satisfactorily proved that it was the owner's intention to set apart the land occupied as a road, to the use of the public *as a highway*, and that there has been an acceptance by the public of the land for such use;
>
> 2. The evidence of intent must consist of such acts or declarations by the owner as clearly and unequivocally indicate his purpose to make the dedication, or such conduct on his part as equitably estops him from denying such intention;
>
> 3. The acts and declarations of the owner connected with the matter of the alleged dedication may be given in evidence in his favor;
>
> 4. The line of the road must be certain and definite; a general privilege or license by the owner to cross his lands, without reference to any special route, will not suffice;
>
> 5. *User* of the road by the public for a considerable length of time without objection by the owner of the land may increase the weight of the evidence, if any there be, arising from *acts or declarations* of the owner indicating his intent to dedicate. But *mere user*, without such acts or declarations, unless for a period of time corresponding to the statutory limitation of real actions, cannot be held sufficient to vest the easement in the public, as by prescription.[21]

In *Mitchell v. City of Denver*,[22] even though the city, six or seven years before the trial, had graded the street and put up sign posts and street names, there was no implied dedication because of lack of evidence of intent where the owner had platted the area but had reserved the strip in question for private use for itself, its successors and assigns.

The Colorado court, in the *Starr* case,[23] refused to find an implied dedication where the road passing through the placer mining claim was used by the public. The line of the road was moved several times as the owner "washed" the gravel for mineral, and the public authorities made some repairs but without being so induced by the owner, and the owner had refused to allow any road to be used except as might be convenient to him at the time.

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17 John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895); City of Denver v. Clements, 3 Colo. 472 (1877).
18 11 McQuillin, Municipal Corporations § 33.45 (3d ed. 1950).
19 11 McQuillin, Municipal Corporations § 33.24 (3d ed. 1950); Note, 12 Syracuse L. Rev. 88 (1960).
20 17 Colo. 458, 30 Pac. 64 (1892).
21 *Id.* at 460, 30 Pac. at 65.
22 33 Colo. 37, 78 Pac. 686 (1904).
23 Starr v. People, *supra* note 20.

In *Christianson v. Cecil*,[24] the court found an implied dedication where the original owner made statements that he intended it to be a public alley. The city cut the curb, cleaned the alley and ribbed the sidewalk crossing, and the line of the alley was definite and had been used for more than twenty years.

To prevent the municipality from being burdened indiscriminately with the preservation of streets whenever an individual should see fit to dedicate a portion of his land for use as streets, the courts require that the offer must have been accepted by the city before the dedication is complete.[25] This acceptance theoretically takes place when it is in the public interest to possess and control the street. During the time after the offer and prior to acceptance, the city is not bound to any duties in connection with the land and acquires no rights or interest therein.[26] The landowner is free to withdraw his offer of dedication unless some public or private rights have intervened.[27] The owner can revoke the offer merely by conveying the same land to another.[28] Conversely the city may lose its right to accept by the doctrine of *estoppel in pais*.[29] In *John Mouat Lumber Co. v. City of Denver*,[30] the case was remanded on the question of the city having been estopped where it appeared the city had never, in the twenty years since the offer of dedication, accepted, repaired or improved the streets dedicated, and at the same time the area had been fenced and a house built.

Whenever a street or highway is abandoned or vacated it is no longer public property. The public officials are not responsible for its repair, and being private property, it must be rededicated according to all the rules applying to dedications before it will again become a street.[31]

C. *Prescription*

Another method that has arisen in Colorado cases by which land becomes a public street is prescription or adverse user.[32] Traditional elements are needed to establish prescription. In addition, Colorado has a statute allowing a road to become a public highway if used adversely for twenty years.[33] Under this statute the elements necessary are that the user "must have been adverse, that is, under claim of right; the line of road must have been reasonably definite and certain; there must have been an unqualified intention to set apart a line for the road, and the use must have been more than mere permissive use."[34] Prescription cannot be established by an "indefinite and indiscriminate use of a wide extent of country at the whim or caprice of the traveler."[35] Continuous public use for

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24 109 Colo. 510, 127 P.2d 325 (1942).

25 Hand v. Rhodes, 125 Colo. 508, 245 P.2d 292 (1952); Trine v. City of Pueblo, 21 Colo. 102, 39 Pac. 330 (1895); John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895); City of Denver v. Denver & S.F.Ry., 17 Colo. 583, 31 Pac. 338 (1892). If the city accepts, the acceptance must be subject to any pre-existing rights of way. City of Denver v. Denver & S.F.Ry., 17 Colo. 583, 31 Pac. 338 (1892); City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693 (1884).

26 Hand v. Rhodes, 125 Colo. 508, 245 P.2d 292 (1952); Board of County Comm'rs v. Warneke, 85 Colo. 388, 276 Pac. 671 (1929).

27 11 McQuillin, Municipal Corporations § 33.60 (3d ed. 1950).

28 Trine v. City of Pueblo, 21 Colo. 102, 39 Pac. 330 (1895).

29 John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895).

30 *Ibid.*

31 Hand v. Rhodes, 125 Colo. 508, 245 P.2d 292 (1952).

32 Hecker v. City & County of Denver, 80 Colo. 390, 252 Pac. 808 (1927); Mitchell v. City of Denver, 33 Colo. 37, 78 Pac. 686 (1904).

33 Colo. Rev. Stat. § 120-1-1(3) (1953).

34 Lieber v. People, 33 Colo. 493, 499, 81 Pac. 270, 271 (1905). *Accord*, Olson v. People, 56 Colo. 199, 138 Pac. 21 (1914); Starr v. People, 17 Colo. 458, 30 Pac. 64 (1892).

35 Friel v. People, 4 Colo. App. 259, 260, 35 Pac. 676, 677 (1894).

the full length of time must be present.[36] Wire gates across a private road so that travelers must open and close them will prevent that road from becoming a public highway under this statute.[37]

Recently the court quoted this statute in justification of a decision.[38] The statute seems to add little to the case; the requirements of the statute are the same as at common law.

Some land was levied upon for taxes and the county became the tax sale certificate holder. With the county's permission, the road in question was then constructed across a portion of this land and was continuously used by the public from 1938 to 1960. In 1945 a treasurer's deed to some of the land was issued to some of the plaintiffs and in 1956 one was issued to the remaining plaintiffs. These plaintiffs, in 1960, claimed ownership of the street area and the right to hold it free from the easement.

The court held: (1) the county's tax sale certificate was only a lien and the county was thus not the true owner from which permission could be obtained to negative the adverse nature of the use; (2) the treasurer's deeds of 1945 and 1956 did not convey a title free from adverse use; and (3) the use fulfilled the requirements to establish a public highway under the statute.

The true owner had, in effect, lost his land and would lose nothing more from adverse use across it. Even though the original owner retained record title, the county was the party most interested in preserving the parcel of ground in order to realize payment for delinquent taxes. Prescription will not ripen against the govern-

36 Goerke v. Town of Manitou, 25 Colo. App. 482, 139 Pac. 1049 (1914).
37 Martino v. Fleenor, 365 P.2d 247 (Colo. 1961).
38 Town of Silver Plume v. Hudson, 15 Colo. Bar Ass'n Adv. Sh. 157 (1963).

ment;[39] neither should this adverse use operate toward a ripened easement where the county was the preserving party for at least seven years.

Furthermore, Colorado has said that adverse possession will be interrupted by a treasurer's deed.[40] The court distinguished this case on the basis that here was an easement established by the public. The court did not elaborate. A tax deed traditionally passes title free from all other interests. Although a majority hold that an easement is not extinguished, other cases have held that easements established after the land is assessed are extinguished by the tax deed because the government is entitled to drive proceeds on the land as it was assessed and not on land as it is later burdened with an easement.[41] Here the land as levied upon was free from easement or adverse use.

The fact that the street was constructed and plainly used so that any grantee in 1945 or 1956 should have had sufficient notice of the easement, lends some support to the court, but it announced no helpful principle of decision. The outcome is that the bare fact situation of adverse use as a road by the public prior to issuance of a treasurer's deed will result in a decision favorable to the adversing public.

The result cannot be criticized. The court refused to allow private individuals, who could have known of the road, to take the only main access from the east into the mountain town of Silver Plume.

II. TITLE

A. Common Law Easement

At common law a presumption exists that only an easement is created when a street is dedicated to the public unless there is some statement to the contrary. The reasoning is that an easement is the greatest privilege needed by the public to be able to pass freely over the street. Colorado is in line with this common law rule when the dedication is by common law rather than by statutory proceedings.[42]

The 1906 case of *City of Leadville v. Coronado Mining Co.*[43] was disposed of in a manner consistent with the rule of the creation of an easement. A statutory dedication had failed but a common law dedication resulted from the failure. This type of resulting common law dedication was not differently treated from any intended common law dedication; that is, it resulted in conveying an easement only. A published opinion in 1901 upon the same *Coronado Mining* case on an earlier appeal[44] had included much dicta that the fee passed. The reasoning in that case was that by the attempted statutory dedication the dedicator must of necessity have intended a fee to pass, therefore his intention would govern in the resulting

39 17A Am. Jur. *Easements* §68 (1957)
40 Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957); Harrison v. Everett, 135 Colo. 55, 308 P.2d 216 (1957).
41 See 17A Am. Jur. *Easements* § 169 (1957).
42 Hecker v. City & County of Denver, 80 Colo. 390, 252 Pac. 808 (1927); City of Leadville v. Coronado Mining Co., 37 Colo. 234, 86 Pac. 1034 (1906); City of Denver v. Clements, 3 Colo. 472 (1877).
43 37 Colo. 234, 86 Pac. 1034 (1906).
44 29 Colo. 17, 67 Pac. 289 (1901).

common law dedication. Upon the later appeal the court stated that the dicta was not controlling.

B. *Statutory Fee*

When statutory proceedings are proper, a "fee" vests in the city by virtue of statute. An early statute provided:

> Upon the filing of any such map or plat, the fee of all streets, alleys, avenues, highways, parks, and other parcels of ground reserved therein to the use of the public, shall vest in such city or town, if incorporated, in trust, for the uses therein named and expressed; or if such town be not incorporated, then in the county, until such town shall become incorporated, for the like uses.[45]

1. Qualified Fee—In Trust. In *Olin v. Denver & R. G. R. R.*,[46] the court declared that the city held title to the street solely for street purposes and that the nature of the title was a qualified fee. The fee would terminate when the land was no longer used for street purposes.

The statute that now vests the fee in the city, found in the article providing for incorporation, reads:

> All avenues, streets, alleys, parks, and other places designated or described as for public use on the map or plat of any city or town, or of any addition made to such city or town, shall be deemed to be public property, and the fee thereof be vested in such city or town.[47]

The first opinion in the same *Coronado Mining* case as discussed above made much of the absence of the words "in trust" in the later statute quoted here. The writer of the opinion thought that a successful statutory dedication passed a fee simple absolute to the city unburdened by the trust. The thought was that under the new statute the streets would no longer be held as a qualified fee, as a fee simple on special limitation. With that interpretation, it was easy to conclude that the mining under the street could be legal only with permission from the city.

As mentioned earlier, that opinion lost most of its vitality when the second appeal decision was announced and the court refused to follow the opinion of the first appeal. Some credit must be given for the realization of the impact in the changed wording, but as late as 1942 the court had reiterated the presence of a trust for the people.[48]

2. Absolute Fee in Surface. The remarks as to the words "in trust" undoubtedly had some influence upon *City of Leadville v. Bohn Mining Co.*,[49] another case decided in 1906. This case deserves special discussion. It should be borne in mind that because of the change in the statute that had been noticed, the contention was strong that the vested fee must be a fee simple absolute.

The mining company was extracting minerals from under an area of the city. The mining was at a depth of four hundred or five

45 This can be found in Colo. Stat. Ann. c. 163, § 156 (1935).
46 25 Colo. 177, 53 Pac. 454 (1898). Further effect upon the title at time of vacation will be considered *infra*.
47 Colo. Rev. Stat. § 139-1-7 (1953).
48 City of Colorado Springs v. Weiher, 110 Colo. 55, 129 P.2d 988 (1942).
49 37 Colo. 248, 86 Pac. 1038 (1906). The New Mexico Supreme Court has said that its identical statute would have to be interpreted as in this Colorado case. Phillips Mercantile Co. v. City of Albuquerque, 60 N.M. 1, 287 P.2d 77 (1955).

hundred feet and would in no way interefere with the ordinary uses of the city streets. The city, however, claiming it owned a fee simple absolute in the streets, brought suit to restrain further mining and recover damages for the ores already taken. The city had acquired its rights from a good statutory dedication. Clearly the mining company could not be allowed to keep the minerals under the theory that there had been merely a common law dedication which passes only an easement. Here some sort of fee was definitely in the city by virtue of the statute: "All avenues, streets . . . described as for public use on the map or plat of any city or town . . . , shall be deemed to be public property and the fee thereof be vested in such city or town."[50] The court felt the question presented was: What constitutes a street as contemplated in the statute?

The court used as it basis the traditional definition that the street included the surface and so much land below the surface as was necessary for ordinary municipal uses such as storm drains, sewers, or gas pipes. It was this area and this area only the fee of which was vested in the city. The city, therefore, could never restrain the use of the subsoil so long as it did not interfere with the ordinary uses of the street. Either by common law easement or by statutory fee the city is allowed to exercise dominion over the surface and some fifteen feet below the surface.

In review, the city has an easement from a common law dedication. It has a fee from a statutory dedication. That fee is in so much of the surface and ground as can legitimately be used for street purposes. Some doubt exists whether the fee is a fee simple absolute or whether it is a fee simple on a special limitation because it is held in trust for street purposes and will terminate and revert to the abutting owners if it should ever cease to be used as a street. A statute governs the vesting when the street ceases to be used as a street, so that this point of the discussion may be academic.[51]

III. Use

The public authorities are vested with a street for the sole purpose of providing free, unobstructed, continuous passage over the land. Incidental uses may be made if in the public interest and for public purposes. Municipalities, for instance, can use the subsurface of the street for sewer pipes, gas pipes and water mains because these are municipal government uses for the general public, and streets are especially suitable for such installation.[52]

The authorities can authorize certain types of use of the street; they can regulate the use and the users.[53] The city can grant the privilege of special use and demand compensation therefor which is deemed to be in the nature of rentals.[54]

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50 See note 47 *supra*.

51 Colo. Rev. Stat. § 120-1-12 (1953).

52 A county highway within city limits retains its character as county highway but is under supervision and control of the town. Morrison v. Town of Lafayette, 67 Colo. 220, 184 Pac. 301 (1919).

53 See Russell v. Aragon, 146 Colo. 332, 361 P.2d 346 (1961) (public authority may abate nuisance summarily if not capricious, unreasonable or negligent); Heckendorf v. Town of Littleton, 132 Colo. 108, 286 P.2d 615 (1955) (town can regulate curb cuts, but not so as to deny or unduly hamper ingress, egress); City & County of Denver v. Trailkill, 125 Colo. 488, 244 P.2d 1074 (1952) (city cannot prohibit reasonable business on streets; can regulate); Staley v. Vaughn, 92 Colo. 6, 17 P.2d 299 (1932) (Denver has power under charter to regulate vehicular traffic); Willison v. Cooke, 54 Colo. 320, 130 Pac. 828 (1913) (no power in municipality to require consent of owners in same block before one can erect a store building); Colorado & S. Ry. v. City of Fort Collins, 52 Colo. 281, 121 Pac. 747 (1911) (city can require railway to operate with due care for public travel).

54 City & County of Denver v. Stenger, 295 Fed. 809 (8th Cir. 1924).

Anyone may use the public streets in conducting his business so long as it does not tend permanently to obstruct passage. This right is subject to the power of the people to make restrictions upon use. Such a restriction is found in a revocable license needed to operate a bus line.[55] Any franchise, a privilege not enjoyed by others in common, and granted in perpetuity, must come from the sovereign, the state, or the city acting under a piece of sovereignty delegated to it.[56]

The Colorado Supreme Court has spoken of the power of a municipality and the purpose of streets in these words:

> The incorporating act . . . created a trust for the holding of the fee simple title of, and to, all streets and alleys of the town, which thereby became vested in the town, in these simple words, "which shall hold the same for the use of the public." This means, that any attempted regulation of the use of the streets or sidewalks, by the town or city, must be for the benefit of the whole public, for travel, the intended purpose of their dedication as such, and only such structures should be maintained in the street and sidewalk areas as are necessary to meet public requirements and use. Many reasons might be presented why a city might obstruct, or even close, a street or sidewalk temporarily in the interest of public use or welfare, but it can never authorize a permanent encroachment by private individuals, and the latter can never successfully set up a claim of right to encumber the public streets or walks. It then follows that the city cannot grant the exclusive use of the streets or sidewalks, or any part thereof, to private persons for their use or gain, for such would be in direct violation of its only right to accept public streets at all.[57]

The Colorado Constitution provides:

> Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners. of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into the court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested.[58]

A. Injunction Against Use

Abutting landowners who do not own the fee in the street, as in the case of many city streets, do not have an interest that entitles

55 See City of Denver v. Girard, 21 Colo. 447, 42 Pac. 662 (1895).

56 People *ex rel.* Foley v. Stapleton, 98 Colo. 354, 56 P.2d 931 (1936); Denver & Swansea Ry. v. Denver City Ry., 2 Colo. 673 (1875); Ward v. Colorado E. R.R., 22 Colo. App. 332, 125 Pac. 567 (1912). The Colorado Constitution has a restrictive provision: "No franchise relating to any street, alley or public place of said city and county shall be granted except upon the vote of qualifying taxpaying electors." Colo. Const. art. XX, § 4. See McPhee & McGinnity Co. v. Union Pac. R.R., 158 Fed. 5 (8th Cir. 1907); Berman v. City & County of Denver, 120 Colo. 218, 209 P.2d 754 (1949). A city which grants a franchise when it has no authority will later be estopped to deny its power when it has specifically recognized the grant after the power has been delegated to it. City of Denver v. Mercantile Trust Co., 201 Fed. 790 (8th Cir. 1912).

57 Wood v. People *ex rel.* Stonebraker, 96 Colo. 431, 433, 43 P.2d 1001, 1002 (1935).

58 Colo. Const. art. II, § 15.

them to successfully enjoin the use or vacation of a street,[59] although they may later have an action for recovery of compensation in the form of damages. Another view noticed in a recent case is that a court of equity cannot interfere with the vacation of a street by public officials except for fraud or plain abuse of power.[60]

Probably an injunction could not be obtained even where the abutting owner held the fee because the constitution speaks of being "needlessly disturbed." The court would probably hesitate to find needless disturbance in a city council's decision unless a plain abuse of power appeared. In contrast, where the use of the streets is under no valid authority, the obstruction or use then constitutes a public nuisance and can be enjoined by an individual who suffers special injury from it.[61]

The general public seems to be able to bring suit to cause the removal of any obstruction of the free passage on streets and sidewalks. The citizen and taxpayer can compel the city to observe its duty to remove them.[62]

B. Compensation for Damages

1. Rights of Abutting Owner. Without the aid of the constitution, the Colorado Supreme Court, in *Colorado Central R. R. v. Mollandin*,[63] would not allow recovery for injuries to property from the use of the street because the fee was in the city and the city has complete control over the use of the street. Mollandin, the plaintiff, was more successful in the federal court[64] where he urged the state constitution as a basis of recovery. That court said the *Colorado Central* case was not controlling, and that the use of the street was a right of property in the plaintiff that, if not taken, was definitely damaged under the provision in the constitution. The same distinction can be made in later Colorado cases where the constitution was always used.

The abutting landowner, even when the fee is in the city, is said to have a peculiar interest in the street. He holds an easement

59 City of Colorado Springs v. Crumb, 364 P.2d 1053 (Colo. 1961); Albi Mercantile Co. v. City & County of Denver, 54 Colo. 474, 131 Pac. 275 (1913); Haskell v. Denver Tramway Co., 23 Colo. 60, 46 Pac. 121 (1896); Denver, U. & P. Ry. v. Toohey, 15 Colo. 297, 25 Pac. 166 (1890); Denver, U. & P. Ry. v. Barsaloux, 15 Colo. 290, 25 Pac. 165 (1890); Denver & S. F. Ry. v. Domke, 11 Colo. 247, 17 Pac. 777 (1888).

60 City of Colorado Springs v. Crumb, 364 P.2d 1053 (Colo. 1961).

61 Ward v. Colorado E. R.R., 22 Colo. App. 332, 125 Pac. 567 (1912); Denver & Swansea Ry. v. Denver City Ry., 2 Colo. 673 (1875).

62 People *ex rel.* Stonebraker v. Wood, 90 Colo. 506, 10 P.2d 331 (1932). Colo. Rev. Stat. § 139-76-2 (1953) imposes the duty to keep the streets open and in repair.

63 4 Colo. 154 (1878).

64 Mollandin v. Union Pac. Ry., 14 Fed. 394 (C.C.D.Colo. 1882).

which is an incorporal hereditament and is property. For wrongful interference with it, the Colorado court allows compensation.[65] The general rule can be stated: Where the adjacent owner is denied free use of the street for ingress and egress and the value of his premises is diminished, it is a damage for which there should be compensation under the constitution.[66] But it is *damum absque injuria* where it is occasioned by a reasonable improvement of the street by proper authorities for the greater convenience of the public.[67] Recovery is denied for these reasonable improvements, these reasonably anticipated uses, upon the justification that the adjacent owner contemplated, at the time he dedicated or at the time he purchased, that the city would alter the use.

2. *Uses—Anticipated—Unanticipated.* It now becomes important to determine what are "anticipated uses" and what are "unanticipated uses." In dictum in two early Colorado cases[68] the court said uses reasonably to be anticipated included the raising or lowering of the grade of the street, the laying of pavements and construction of culverts, the building and operation of a street railroad, construction of sewers and the laying of gas and water pipes. For these changes no damages will be awarded.

Unanticipated uses have included an ordinary railroad as distinguished from a local street railway,[69] a water supply ditch,[70] a viaduct,[71] an underpass,[72] and a material change of street grade.[73]

As to the use of the street for an ordinary railroad, the city may have the power to control railroads passing into the city and even the power to license the use of the streets to an ordinary railroad. This power, however, does not serve as notice to the landowner, who dedicates or buys lots next to a street, that a likely use of the street will include an ordinary railroad. Further, the ordinance granting a license to the railroad will not immunize the railroad from liability for actual injuries sustained by abutting landowners even though the ordinance is within the city's power.[74]

Despite the remark in the early case that changes in the street grade could be anticipated and therefore were not compensable, certain refinements of policy have been enunciated in later cases.

65 It is easier to award compensation under the Colorado Constitution which provides compensation where property is "taken or damaged" than under others that compensate only for property "taken." Comment, 16 Ore. L. Rev. 155 (1937).

66 Roth v. Wilkie, 143 Colo. 519, 354 P.2d 510 (1960); Minnequa Lumber Co. v. City & County of Denver, 67 Colo. 472, 186 Pac. 539 (1919); Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919); Russo v. City of Pueblo, 63 Colo. 519, 168 Pac. 649 (1917); City of Colorado Springs v. Stark, 57 Colo. 384, 140 Pac. 794 (1914); Denver & S.F. Ry. v. Hannegan, 43 Colo. 122, 95 Pac. 343 (1908); City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789 (1894); Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443 (1890); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883).

67 Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 Pac. 409 (1913); City of Pueblo v. tSrait, 20 Colo. 13, 36 Pac. 789 (1894); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883).

68 Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883). See also Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 Pac. 409 (1913).

69 Mollandin v. Union Pac. Ry., 14 Fed. 394 (C.C.D.Colo. 1882); Denver & R.G. Ry. v. Bourne, 11 Colo. 59, 16 Pac. 839 (1887); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883). Mere increase in railroad traffic is within the original servitude and is not further grounds for compensation. Denver & S.F. Ry. v. Hannegan, 43 Colo. 122, 95 Pac. 343 (1908).

70 Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443 (1890).

71 Minnequa Lumber Co. v. City & County of Denver, 67 Colo. 472, 186 Pac. 539 (1919); City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789 (1894).

72 City of Colorado Springs v. Stark, 57 Colo. 384, 140 Pac. 794 (1914).

73 City of Denver v. Bonesteel, 30 Colo. 107, 69 Pac 595 (1902).

74 Denver & S.F. Ry. v. Hannegan, 43 Colo. 122, 95 Pac. 343 (1908); Denver & S.R. Ry. v. Domke, 11 Colo. 247, 17 Pac. 777 (1888); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887).

In *City of Denver v. Bonesteel*,[75] the court refused to be influenced by that early dictum where the city materially changed the grade of the street and the lot owner had made improvements in reliance upon an established grade.[76] In *Bonesteel* the court summarized the holdings of other jurisdictions:

> Some of them hold that a city is liable in damages to the abutting owner of land on a street the grade of which has been reduced from the natural surface, whether it be the one first established or for a change of a previously established grade. Others seem to restrict liability to cases where there has been a change of a previous grade, and to exempt from the operation of the constitutional provision the first reduction of grade from the natural surface.[77]

The rule that the lot owner must anticipate reasonable changes which are for the good of the public possibly is not affected greatly by the decision to allow recovery for a material change of street grade. The first establishment of grade is certainly to be anticipated. Subsequent changes would be rare and could be justifiably classed as unanticipated.

Only four years after the *Bonesteel* case the court further solidified the law as to street grade changes in the case of *Leiper v. City & County of Denver*[78] where the facts presented were that of an original change of grade from the natural surface. The court approved of *Bonesteel*, but was constrained by the same early dictum, and held that the first change of grade made in accordance with the first establishment of grade, in other words the change from the natural surface, was reasonably to be anticipated and no recovery could be had. The court concluded:

> As well said by Judge Dillon, while sensible of the apparent difficulty of defining the grounds for the distinction, we regard it as almost, if not quite, *stare decisis* in this jurisdiction, that, for the raising or lowering of the grade of a street by a municipality from the natural surface to the grade established in the first instance, the municipality is not liable to the abutting lot owner for consequential damages to his property, unless the change of grade is unreasonable, or has been negligently made.[79]

3. Extent of Access. The taking or damaging of access is a compensable injury as noted above. The injury is compensable even though the access is not wholly taken. For instance, a man should be compensated for loss of business where the street upon which he is located is no longer a commonly traveled way as a result of some obstruction set up by the city.[80]

The easement of an abutting landowner that may be taken or

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75 See note 73 *supra*.

76 When plaintiff landowner relies upon the appearance of the grade and fails to inquire as to the established grade of the street, that failure may prevent recovery. See City of Denver v. Vernia, 8 Colo. 399, 8 Pac. 656 (1885); Aicher v. City of Denver, 10 Colo.App. 413, 52 Pac. 86 (1897).

77 See note 73 *supra* at 111, 69 Pac. at 596.

78 36 Colo. 110, 85 Pac. 849 (1906).

79 *Id.* at 118, 85 Pac. at 851.

80 Minnequa Lumber Co. v. City & County of Denver, 67 Colo. 472, 186 Pac. 539 (1919). See Roth v. Wilkie, 143 Colo. 519, 354 P.2d 510 (1960); Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919); City of Denver v. Bonesteel, 30 Colo. 107, 69 Pac. 595 (1902); City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789 (1894).

damaged by changed use or vacation extends to the full width of the street and not just to the center of the street.[81]

4. Factors Affecting Recovery—Damages. The abutting landowner who has been injured by an unanticipated use of the street is undoubtedly entitled to recover. Some care must be taken, however, to choose the proper party defendant. The plaintiff can recover against the municipality only when the new, unantipicated use is initiated for the direct safety and benefit of the public. For damage from a use which brings about a private benefit, such as allowing the railroad to use a street, the recovery may be had against only that private user on the theory that the one gaining a benefit should compensate for injury to others.[82]

An abutting landowner may be held to have impliedly assented to a use that has continued without objection from him for a long period of time.[83]

A release by the landowner of claims for damage from construction of a railroad or any other use will prevent the person releasing from later objecting to an alteration of the rails or an alteration of whatever use it is; the use has not changed.[84]

Colorado follows orthodox law in holding that a person who suffers only in kind like the rest of the citizenry from a change of use of the street cannot recover for the injury. The injury must be particular, different in kind, special, and affecting property or an appurtenance.[85]

The term "abutting landowner" is, in this area of the law, used to define a general class of persons. But it is not used so strictly as to deny recovery in a proper case to one whose property does not abut the portion of the street that has been applied to a different use. The court, in *Denver Union Terminal Ry. v. Glodt*,[86] said:

> The cases in this and in other jurisdictions, which denied a recovery to one whose property was located on another street, or on a different part of the street vacated or obstructed, were generally cases where such plaintiff or complainant was not deprived of the only reasonable means of access to his property. 13 R.C.L. 74, sec. 65. There are authorities holding that one whose property does not abut upon the street or part of the street which is vacated is entitled to compensation where all access to his property to the system of streets in one direction is cut off. 28 Cyc. 1083

81 Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919).

82 Roth v. Wilkie, 143 Colo. 519, 354 P.2d 510 (1960) (no discussion as to why private landowners abutting the vacated street were proper defendants, but presumed they benfited most); Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919) (railroad claimed that damage actually resulted from the vacation, but court said the vacation was solely to allow development of railroad); City of Colorado Springs v. Stark, 57 Colo. 384, 140 Pac. 794 (1914) (recovery against city because underpass was primarily for benefit of city traffic even though railroad built it); Denver & R.G. Ry. v. Bourne, 11 Colo. 59, 16 Pac. 839 (1887) (recovery from railroad); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887) (recovery from railroad); Sorensen v. Town of Greeley, 10 Colo. 369, 15 Pac. 803 (1887) (no recovery against city where railroad destroyed flume carrying water to plaintiff's crops; Town of Idaho Springs v. Filteau, 10 Colo. 105, 14 Pac. 48 (1887) and Town of Idaho Springs v. Woodward, 10 Colo. 104, 14 Pac. 49 (1887) (no recoveries from city where flume carrying water to mining company leaked); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883) (no recovery from city for railroad in street).

83 Denver, U. & P. Ry. v. Barsaloux, 15 Colo. 290, 25 Pac. 165 (1890); Denver & S.F. Ry. v. Domke, 11 Colo. 247, 17 Pac. 777 (1888).

84 Denver, U. & P. Ry. v. Toohey, 15 Colo. 297, 25 Pac. 166 (1890).

85 City of Colorado Springs v. Weiher, 110 Colo. 55, 129 P.2d 988 (1942); Minnequa Lumber Co. v. City & County of Denver, 67 Colo. 472, 186 Pac. 539 (1919); Gilbert v. Greeley, S.L. & P. Ry., 13 Colo. 501, 22 Pac. 814 (1889).

86 67 Colo. 115, 186 Pac. 904 (1919).

> . . . The correct rule, applicable in the instant case, is that the owner of property which does not abut on the part of the street closed is entitled to compensation, provided he is able to prove special and peculiar damage.[87]

This case found that the plaintiff's easement had been substantially impaired. It found that the plaintiff, as a result of the construction of an approach to a viaduct and the closing of certain other streets, had no access to the business district, even by going a reasonable distance out of the way, due to lack of through streets and presence of railroad tracks. The case thus came within the rule to which reference has been made that one whose property does not abut upon the street vacated is still entitled to compensation if all access to the system of streets in one direction is cut off.

The case is in this way distinguishable from *Whitsett v. Union Depot & R.R.*[88] where the plaintiff complained that the Union Depot was placed in his direct path to the business district, but nothing showed that he was cut off from the whole system of streets in that direction.

The measure of compensation for interference of ingress and egress is the actual diminution in the market value of the abutting land, for any use to which it could reasonably be put, which has resulted directly from the changed use or vacation of the street.[89]

5. Other Theories of Recovery. Even though a constitutionally compensable injury cannot be established, the city may be held liable under tort law for negligently making the change.[90]

Another theory used to recover damages for wrongful use of streets is that of public nuisance.[91] This theory also requires showing a special or peculiar injury beyond that suffered in common with the public. Nuisance might be of value where the plaintiff is otherwise estopped to question the use, but a public nuisance could be established in the "altered" use. The theory of nuisance may also be valuable when the statute of limitation period has run since the change of use occurred, but a continuing nuisance can be established, against which the statute begins to run anew each day.[92] And, as mentioned earlier, the theory of public nuisance can be the basis of a suit for injunction against the wrongful use.

IV. VACATION

The municipal authorities have the power to vacate streets when the action would be in the best interests of the public.[93] These vacations may take place in order that a changed use can be carried out, or they may take place as an independent act solely because the public no longer needs the street for passage. In either event the act must not be arbitrary.[94] Private benefit may accrue from the vacation but not at the expense of the public interests.

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87 *Id.* at 118-19, 186 Pac. at 906.
88 10 Colo. 243, 15 Pac. 339 (1887).
89 City of Denver v. Bonesteel, 30 Colo. 107, 69 Pac. 595 (1902); Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443 (1890).
90 City of Denver v. Vernia, 8 Colo. 399, 8 Pac. 656 (1885).
91 Jackson v. Kiel, 13 Colo. 378, 22 Pac. 504 (1889).
92 Union Pac. Ry. v. Foley, 19 Colo. 280, 35 Pac. 542 (1893).
93 A deed of vacation is competent evidence when a public highway is alleged. Gromer v. Papke, 71 Colo. 440, 207 Pac. 862 (1922).
94 City of Goldfield v. Golden Cycle Gold Mining Co., 60 Colo. 220, 152 Pac. 896 (1915).

The Colorado Constitution provides:

> Section 25. Special legislation prohibited.—The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say; for granting divorces; laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys, and public grounds . . . .[95]

This specifically prohibits the legislature from vacating streets, but it does not prohibit delegation. By this restriction it is implied that the legislature has the power to authorize the municipality to act in such cases.[96]

A. By Private Persons

Colorado once had a statute that provided that streets could be vacated by private action with the consent of all the landowners in a town site or subdivision of not less than four blocks adjacent to each other.[97] No statute of the legislature can confer upon public or private individuals the power to vacate a street in an arbitrary manner. Any deed of abutting owners which purported to vacate the street under the authority of the statute, but which was done arbitrarily was a nullity.[98] The same principle would govern a vacation by public authorities.

While the emphasis of this study is upon city streets, in many cases streets and roads and highways are treated the same.[99] Under this statute which allowed private action of vacation, however, there was a distinction. This statute did not include within its description a "road" in any outlying area that had not been subdivided into blocks because streets and alleys exist only where the land is in blocks.[100]

B. Compensation for Damage

So that it is not overlooked, the vacation of a street will often operate to deny abutting landowners of part of their access. To the extent that there is special injury, there can be recovery the same as when the use is changed.[101]

95 Colo. Const. art. V, § 25.
96 City of Goldfield v. Golden Cycle Mining Co., 60 Colo. 220, 152 Pac. 896 (1915); Whitsett v. Union Depot & R.R., 10 Colo. 243, 15 Pac. 339 (1887).
97 This repealed statute can be found in Colo. Stat. Ann. ch. 163, § 117 (1935).
98 City of Goldfield v. Golden Cycle Mining Co., *supra* note 96.
99 Armstrong v. Johnson Storage & Moving Co., 84 Colo. 142, 268 Pac. 978 (1928).
100 Balanced Rock Scenic Attractions, Inc. v. Town of Manitou, 38 F.2d 28 (10th Cir. 1930).
101 Roth v. Wilkie, 143 Colo. 519, 354 P.2d 510 (1960); Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919).

C. Nature and Effects of Reversion

1. Early Confusion. An early case in Colorado, *Denver & S.F. Ry. v. Domke*,[102] contained surprising language, inconsistent with the common law, which caused some confusion as to the nature of the title and its effect upon vacation of the street. The court, in discussing the right of abutting landowners to enjoin the change from a street railway to an ordinary railway, said:

> As we have already seen, the fee to Willow Lane and Clark Street is by law vested in the city in trust for the use of the public. It is not, and never was, in the present plaintiffs, who are purchasers of lots subsequent to the dedication of the streets. There is no evidence to show that the grants to them included the reversionary interest or reserved rights, if any such interest or rights there be, of the dedicator in this fee. If the street should be abandoned by the municipality, or for any other reason the trust should fail, and the fee pass out of the city, it would not revert to plaintiffs. *Gebhardt v. Reeves*, 75 Ill. 301. It follows, therefore, that the increased burden mentioned would not constitute an actual taking of plaintiffs' property, though their peculiar interest in the street as abutting owners might entitle them to compensation for injuries inflicted.[103]

The court continues immediately with what would seem to be more nearly orthodox reasoning and not quite so extreme:

> Besides, it is suggested that, where such a qualified fee in the city as we are now considering exists, "the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value, or to be regarded as property, which, under the constitution, is required to be paid for when its use is appropriated by the public." *Spencer v. Railroad Co.* 23 W. Va. 406, and cases cited.[104]

Later the court, in *Olin v. Denver & R.G. R.R.*,[105] took the opportunity to rid itself of the strong language to the effect that upon vacation the land would not revert to the abutting lot owners. In that case the court said that this language had been mere dicta. It proceeded to note also that the *Domke* case was probably the reason why the legislature had amended the statute in 1889 in which it provided that upon vacation, the fee vested in the abutting lot owners to the center of the street.[106]

2. Conveyance of Abutting Lots Before Vacation. To form a basis for discussion of the effect of a vacation upon the state of the title, the effect of conveyances of abutting land should be examined.

Having reasoned that the grantee of land is entitled to all the appurtment advantages, the rule has been followed that the grantee takes title to the center of the street abutting, to the extent that the

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102 11 Colo. 247, 17 Pac. 777 (1888).
103 *Id.* at 254, 17 Pac. at 780.
104 *Id.* at 254-55, 17 Pac. at 780.
105 25 Colo. 177, 53 Pac. 454 (1898).
106 Colo. Sess. Laws 1889, § 1 at 461-62.

grantor has any interest in it, unless the grant expressly excludes the street.[107]

An exception to this rule, or a further elaboration of it, is that where the abutter-grantor has only an easement in the street and the fee is vested in the public, then the interest to the center of the street is not conveyed appurtment. The conveyance goes only to the edge of the street.[108] Thus, the rule is of importance only where the fee to the street is held to be in the dedicator, and has not passed to the city, that is, where the street originated by a common law dedication.

Another situation that bears upon the application of the rule is that once a conveyance has separated the street from the lots either by describing them separately or by excluding one, then subsequent grantors can never be held to have included the street in the conveyance describing the lots only.[109]

An interesting interpretation of a deed, and the application of these rules occurred in *Skerritt Inv. Co. v. City of Englewood*.[110] A phrase in the deed read:

> [T]hat in the event said street north of the lots hereby conveyed (lots 48 and 49) and now known as Sheridan Avenue, should for any reason be vacated, or cease to be used as a public street, then the party of the second part shall have the refusal of purchasing a strip fifty feet in width on the north of the property hereby conveyed at the then market value thereof, which value shall be fixed by any court of competent jurisdiction.[111]

The phrase was held to be repugnant to the previous express unrestricted grant and therefore not operative to, in any way, overcome the presumption of conveying title to the center of the street.

3. Vesting Upon Vacation. Colorado cases have held the fee to the street to vest in the abutting landowner under the common law or by virtue of the Colorado statutes which have generally been a reenactment of the common law with slight variations in specific situations.[112]

4. Conveyance After Vacation. A recent case divided the Colorado court on the question of conveyances after vacation of a street. *Morrissey v. Achziger*[113] deserves special treatment. The area through which the street in question had run was platted and the streets therein were dedicated in 1887. In 1937, the street was vacated in front of lots 7 through 10, owned at that time by Stella Kate Cullen. Cullen died leaving the lots to one Sarah Burns who conveyed "Lots Six (6), Seven (7), Eight (8), Nine (9) and Ten (10), Block Sixteen . . . ." to the defendant Morrissey, who, in turn, conveyed to the plaintiff by a like description.

The plaintiffs brought a quiet title action over the area formerly in the street. The defendant, Morrissey, claimed that the area of the

107 Skerritt Inv. Co. v. City of Englewood, 79 Colo. 645, 248 Pac. 6 (1926); McDonald v. Kummer, 56 Colo. 153, 137 Pac. 51 (1913) (dictum); Overland Mach. Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574 (1902) (dictum); Olin v. Denver & R.G. R.R., 25 Colo. 177, 53 Pac. 454 (1898).

108 McDonald v. Kummer, 56 Colo. 153, 137 Pac. 51 (1913) (dictum).

109 Overland Mach. Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574 (1902).

110 79 Colo. 645, 248 Pac. 6 (1926).

111 *Id.* at 652, 248 Pac. at 9.

112 Morrissey v. Achziger, 364 P.2d 187 (Colo. 1961); Skerritt Inv. Co. v. City of Englewood, 79 Colo. 645, 248 Pac. 6 (1926); Overland Mach. Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574 (1902). The present statute is Colo. Rev. Stat. § 120-1-12 (1953).

113 364 P.2d 187 (Colo. 1961).

street was not intended to be passed to the plaintiffs. He also claimed that he should have reformation of the deed from Burns to reflect the true intent between Burns and himself that the street area was to pass.

Briefly the court said that the original abutting owner, Cullen, had been vested with the fee upon vacation of the street. This was in no way determinative of the case, however. The court held that the strip of land formerly in the street must be included in the description to be conveyed with the lot. The court said:

> Certainly a person owning contiguous tracts of land can convey one without conveying the other. A deed which accurately and correctly describes a tract of land is not subject to construction or interpretation. If the description does not express the intention of the parties, reformation is the proper remedy. To hold otherwise would create chaos and add a new and frightening chapter to the law of conveyancing.[114]

Mr. Justice Doyle, two other justices joining, said:

> I respectfully dissent! . . . [W]e are warned that "To hold otherwise would create chaos and add a new and frightening chapter to the law of conveyancing." I submit that a rule which has a settling rather than an unsettling effect on titles is not apt to create chaos. A rule which prevents properties from being disjointed and which is designed to obviate the existence of unusable rectangles of property which could only serve to haunt adjacent owners is not going to create chaos.[115]

Such was the theme of a convincing dissenting opinion. Mr. Justice Doyle thought it was important to determine the ownership of the street area. Because the street was located outside the city limits, and because no Colorado statute vests title in the county the common law must therefore govern.

Where the common law governs, the public acquires merely an easement; the fee remains in the landowner. If the fee remains in the landowner, he reasoned, then upon vacation of the street the land is freed from the public easement but none of its area is subject to any change in ownership.

Mr. Justice Doyle inquires: "what change is effected by vacation which requires that it be mentioned in a conveyance?"[116]

The law contains authority for the majority view of the court that the area formerly in the street must be described to be conveyed.[117] To support this theory it is said that after vacation the reason for the rule no longer exists; the owner is vested with title and with possession and control and thus can choose to convey it in whole or in separate tracts as he can with any land owned absolutely. "Land is never appurtenant to land," the several cases say, and one tract of land is never passed as an incident or accretion by conveyance of an adjoining tract.[118]

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114 *Id.* at 189.
115 *Id.* at 189-91.
116 *Id.* at 191.
117 Both 2 Elliott, Roads and Streets § 1192 (3d ed. 1911) and Annot., 2 A.L.R. 6, 33 (1919) quote from White v. Jefferson, 110 Minn. 276, 124 N.W. 373 (1910).
118 See the Washington cases discussed in Annot., 49 A.L.R.2d 982, 1003 (1956).

Title Standard Number 4 calls for any conveyance made after vacation to include a specific description of that area of the prior street if it is to be successfully conveyed.[119] Morrissey relied heavily on this title standard[120] and Doyle's dissent charged influence by it. The advisability of adherence to these standards is not here to be discussed except to say that they do not and should not have force of law.

The dissenting viewpoint is also supported in law and is the prevalent viewpoint of the recent cases.[121]

The question cannot escape being one of construction. The majority silently treated the land as being two tracts of land, the lot was a different tract from the street. The conveyance, under this view, became unambiguous. "Lot Seven" meant to the edge of the street.

The dissent treats the land as always having been one tract. Upon this basis the applicable rule is that all the grantor's interest is conveyed that is not reserved.

Niceties of title have been troublesome in these Colorado cases. The court, in this *Morrissey* case, has ignored the nature of the title in the street. The case fails to give importance to the state of the title in an effort to conform to local title examination practices. The case is objectionable in that the majority has ignored what has helped to standardize and give predictability to property law, that is, the concept of various types of ownership.

A slightly different problem for the court has been the enactment of statutes giving a "fee" to the city. The court has always tended toward the common law easement, with the result that the city has gained nothing by this statutory fee. For example, where a statutory dedication fails the resulting common law dedication will create an easement even though the original intent was to pass a fee. The court has also required strict compliance with the statute to complete a statutory dedication thereby limiting the number of times the city receives a fee.

Most notable of the court's tendency was the *Bohn Mining* case where the use of the subsoil for mining raised a question concerning the nature of the fee vested in the city. The "fee" suddenly became conspiciously similar to the common law easement.

Colorado has produced some interesting ramifications of this area of the law and in the process has nullified the statutory provisions as to ownership.

119 Colo. Bar Ass'n, Real Estate Standards No. 4.
120 Brief for Plaintiff in Error, Morrissey v. Achziger, 364 P.2d 187 (Colo. 1961).
121 Annot., 49 A.L.R.2d 982, 1002 (1956).